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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

TREASURE CHEST THEMED VALUE
MAIL, INC.,

Plaintiff,

v.

17 CV 00001 (NRB)

DAVID MORRIS INTERNATIONAL,
INC.,

Defendant.

New York, N.Y.
June 5, 2018
9:41 a.m.

Before:

HON. NAOMI REICE BUCHWALD,

District Judge

APPEARANCES

DANIEL KNOX
Attorney for Plaintiff
-and-
ALEXANDER KADOCHNIKOV

LEHMAN LAW GROUP LLC
Attorneys for Defendant
BY: BRIAN E. LEHMAN
JULIE R. SOLARZ

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(Case called)

THE LAW CLERK: Is the plaintiff present and ready to proceed?

MR. KNOX: Yes.

THE COURT: Just state your name for the record.

MR. KNOX: Daniel Knox, Knox Law Group.

THE LAW CLERK: Is the defendant present and ready to proceed?

MR. LEHMAN: Yes, your Honor.

Brian Lehman, from Lehman LG LLC, and the principal for David Morris International is in the front row.

THE COURT: Okay. And I think Ms. Solarz is present?

MS. SOLARZ: Julie Solarz, attorney for the defendant.

THE COURT: All right.

I thought it would make sense to begin by addressing the recent letter exchange, starting with the defendant's June 1st letter, responded to by the plaintiff on June 2nd, and the reply from the defendant on June 3rd, in which the defendant is moving for judgment under Rule 52(c) and also moving to preclude four exhibits that were appended to the affidavit of the plaintiff's principal, Mr. Shane.

So, I'm prepared to rule on all those motions, but before I do, Mr. Lehman, if there's something that you wish to say that you haven't said in your papers, please do.

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1 MR. LEHMAN: Thank you, your Honor.

2 Just two quick things that are not in the letter: We
3 would move to preclude the exhibits as hearsay, those four.
4 They're out-of-court statements that I believe are being
5 presented for the truth therein. I don't know of any other
6 reason why they're being presented.

7 And, particularly, there's one email that involves
8 match-back email that was sent by someone who isn't in this
9 courtroom, as far as I know. And the second is we would move
10 to preclude at least what they call the postal receipt under
11 the best evidence rule, which I think is Federal Rule of
12 Evidence 1002. They're required to give the original. So, in
13 addition to the reasons stated in the letter, those would be
14 the two other reasons we would move to preclude.

15 Thank you, your Honor.

16 MR. KNOX: Your Honor, just in response to those
17 objections: The evidence -- they're excepted from the hearsay
18 rule as business records, commonly kept in the business of my
19 client, including the postal receipt, the match-back report,
20 and even the email between the counsel -- I'm sorry, between
21 the parties regarding the number of leads that were provided.

22 THE COURT: All right.

23 I think that it is relevant to recall a little history
24 of this case before specifically addressing the motions.

25 We had a conference on April 17th -- it was a fairly

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1 lengthy conference, 22 pages of transcript -- and at the end of
2 that conference, I advised the defendant, who was expressing
3 some dissatisfaction with the discovery situation, to propose
4 targeted document requests. Well, the very next day, the
5 defendant --

6 Who I understand has never deposed Mr. Shane?

7 MR. KNOX: Correct, your Honor.

8 THE COURT: -- chose not to file those document
9 requests, but instead sent me a letter and said he was ready
10 for trial, foreswearing any additional discovery.

11 So, let's turn to the specifics of the motion to
12 preclude.

13 The postal service receipt, which is Exhibit D, first,
14 is a business record of the plaintiff. But, moreover, the fact
15 that the plaintiff did this mailing isn't even in controversy,
16 so fighting about the exhibit seems quite pointless.

17 Exhibit E are these electronic newsletters and social
18 media emails that the plaintiff posts. The claim is that these
19 documents are of some surprise to the defendant. I find that
20 hard to believe. If I were engaged in a business transaction
21 in which I was contracting for such exposure, I think as a good
22 businessperson, I would have checked it at the time, so I don't
23 think there's any surprise. And remember that the defendant
24 did have a chance to seek additional discovery and forewent
25 doing so.

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1 Exhibit F are the leads, presumably, sent to the
2 defendant at the time. So, that motion is denied.

3 The Exhibit G at the April 17 conference, when this
4 issue of match back with respect to another company was raised,
5 I ruled against the introduction of that. Frankly, had I
6 understood better at the time that the proffer of that evidence
7 was really more in the nature of rebuttal evidence, and had I
8 appreciated that the defendant had decided not to depose
9 Mr. Shane, facts which I think are actually fairly critical, I
10 would not have ruled the way I did, but I did. However, there
11 is no reason that Mr. Shane cannot testify about whether other
12 companies who were included in the same mailing either
13 expressed dissatisfaction or were satisfied. So, I don't think
14 Exhibit G is very significant in this context.

15 Let's turn to Rule 52, the motion.

16 I think I ought to start by saying that -- well,
17 actually, let me go back. Mr. Lehman, you argued -- well, you
18 asserted, I think, somewhat rather than argued. In your
19 proposed findings of fact and conclusions of law, you put in
20 some law about ambiguous contracts, and I honestly have no idea
21 what you find ambiguous about the contract. I do not find
22 anything about the contract ambiguous. If you're pursuing
23 that, could you explain it to me?

24 MR. LEHMAN: Yes, your Honor. I think there would be
25 two ambiguities, the most important of which is the phrase

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1 "digital impressions." At the last hearing that you referred
2 to on April 27th, everyone in the courtroom, including
3 Mr. Knox, considered that to mean emails. So, from page 13 of
4 that transcript, your Honor said: The point is Treasure Chest
5 sent these mailings on a certain date, supposedly did follow-up
6 by email, the follow-up is by email, right?

7 And then Mr. Knox responded: It should have been a
8 follow-up by email, if anything.

9 And that was our understanding throughout the 18
10 months of this litigation. The exhibits that Mr. Knox has
11 presented involve social media, Twitter, Instagram, Facebook
12 page as satisfying the phrase "digital impressions." If that's
13 true, then I would argue that they're either so ambiguous, that
14 the contract should be void, or that it should be interpreted
15 in our favor as to only meaning emails.

16 MR. KNOX: Your Honor, to clarify, emails were sent,
17 but there was also a posting on the social media pages as well.
18 The impressions themselves, the advertisement, was presumably
19 created by the defendant and provided to the plaintiff for such
20 a purpose, specifically to post on its social media pages. So,
21 for them to argue it now, I find absolutely disingenuous.

22 MR. LEHMAN: Your Honor, I don't know that there's any
23 evidence that we presumably did anything to put it on social
24 media. And I think that will be a question to --

25 THE COURT: I don't think you were putting it on

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1 social media, but I think the plaintiff had a variety of social
2 media accounts, and they, as I understand it, posted
3 information about the defendant companies on those accounts,
4 along with other of the companies that they were advertising in
5 that mailing. I think -- I don't really buy your argument, so
6 I don't think "digital impressions" translates to email. Email
7 is email.

8 But, also, if you look at what is page 3 of 14 of the
9 exhibits, if you look at the very top, it says, "View This
10 Email In Your Browser." So, I don't find that to be ambiguous.

11 Go ahead.

12 MR. LEHMAN: And the second one was, your Honor, the
13 requirement that my client give up to -- I'm trying to find
14 it -- it's in section 3 of the contract -- up to 40,000 in
15 airfare and hotel accommodations. There is case law that -- in
16 New York that states that when you say a phrase such as up to
17 40,000, the contract is void because the Court can't
18 definitively determine where between zero and 40,000 to award
19 or in which time period.

20 THE COURT: Okay. But that has nothing to do with
21 whether the plaintiff breached the contract or not.

22 MR. LEHMAN: That's correct, your Honor. It would
23 have --

24 THE COURT: So why don't you get to -- I think that's
25 the first step. I think, as I understand it, it means that the

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1 plaintiff can demand of you up to 40,000 in airfare and hotel
2 accommodations. It simply doesn't require them to. You could
3 come out ahead.

4 So, I reject -- and as everyone recognizes, it is the
5 role of the Court to determine whether a contract is ambiguous
6 or not. I reject the argument that this contract is ambiguous.

7 And, again, in your proposed findings and conclusions,
8 you stated that, at paragraph 27, "Defendant hereby withdraws
9 its fraud and breach-of-contract claims," and in 29, you said
10 that, "Because the Court has not yet determined whether the
11 contract at issue is valid, plaintiff does not withdraw its
12 counterclaim of unjust enrichment." However, I have now found
13 the contract to be valid, so I assume that you've also
14 withdrawn your claim of unjust enrichment.

15 MR. LEHMAN: No, your Honor. But I would recognize,
16 now that you've ruled, that the contract isn't ambiguous, that
17 that eliminates the unjust enrichment clause under New York
18 law, and we will just preserve the issue for appeal.

19 THE COURT: All right. So you're no longer claiming
20 that the plaintiff breached the contract, you're no longer
21 claiming the plaintiff committed fraud, and you recognize that
22 you don't have a claim for unjust enrichment given my ruling on
23 the validity of the contract.

24 I really don't think I understand what your argument
25 is -- your argument that the affidavit submitted by Mr. Shane

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1 is insufficient to set out a prima facie case.

2 MR. LEHMAN: Given your Honor's rulings, I could argue
3 it, but I think that, at this point, I would just preserve the
4 Rule 52 issue for appeal and --

5 THE COURT: All right. Okay, fine.

6 You have no witnesses, correct?

7 MR. LEHMAN: I have witnesses for impeachment
8 purposes, your Honor. Just one.

9 THE COURT: All right. Well, let's discuss this a
10 little bit more.

11 Why don't we just call Mr. Shane, swear him in, and
12 then let you -- do you want to cross-examine him?

13 MR. LEHMAN: Yes, your Honor.

14 THE COURT: Okay.

15 Be careful. There are always wires on these floors.

16 RICHARD FRANKLIN SHANE,

17 called as a witness by the Defendant,

18 having been duly sworn, testified as follows:

19 THE LAW CLERK: Would you please state your full name
20 and spell your last name for the record.

21 THE WITNESS: Richard Franklin Shane, S-h-a-n-e.

22 THE COURT: Please be seated.

23 THE WITNESS: Thank you.

24 THE COURT: I think the typical first question at this
25 point is normally Mr. Knox's, but I'll do it for you:

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Shane - Cross

1 Mr. Shane, is the document I'm showing you, which
2 bears what we call the ECF designation document 39, a copy of
3 the affidavit that you submitted in this case?

4 THE WITNESS: Yes, your Honor, it is.

5 THE COURT: And as you sit here today, do you still
6 swear that the entirety of this affidavit is true and correct?

7 THE WITNESS: Yes, your Honor, I do.

8 MR. LEHMAN: Thank you, your Honor.

9 CROSS-EXAMINATION

10 BY MR. LEHMAN:

11 Q. Mr. Shane, do you have any reason to think that your memory
12 would be impaired today?

13 A. No. Can you speak up, Brian? I'm hard of hearing.

14 Q. I'd appreciate you calling me Mr. Lehman since I'm calling
15 you Mr. Shane.

16 THE COURT: Just one second. We can up the mics.

17 Q. Mr. Shane, can you tell me about your business, please?

18 MR. KNOX: Objection.

19 THE WITNESS: About my business?

20 THE COURT: That's not --

21 BY MR. LEHMAN:

22 Q. Mr. Shane, do you have offices in New York?

23 A. Yes.

24 Q. Where are your offices located?

25 A. 104 West 40th Street, New York, fifth floor.

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Shane - Cross

1 Q. Do you have any other offices?

2 A. I have offices -- sometimes when I travel, I keep an office
3 in Colorado, when I travel, I'll keep an office in Los Angeles,
4 and we have an office or someone that works for me in Europe.

5 Q. You just said "We." Do you have other employees or people
6 you work with?

7 A. I have independent contractors.

8 Q. Who do you work with?

9 THE COURT: Excuse me. I don't understand the
10 relevance of any of these questions.

11 MR. LEHMAN: It's going to go to how this process
12 worked. We do not believe that he actually even mailed these.
13 And there should be other people who participated in a
14 1.4 million mailing.

15 THE WITNESS: May I address that, your Honor? This is
16 my first time in the court, so bear with me.

17 THE COURT: All right. Well, if you want to ask him a
18 targeted question as to who else participated in creating
19 these --

20 BY MR. LEHMAN:

21 Q. Who is your chief digital marketing director?

22 A. Excuse me?

23 Q. Who is your chief digital marketing director?

24 MR. KNOX: Objection.

25 THE COURT: This assumes a fact not in evidence.

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Shane - Cross

1 BY MR. LEHMAN:

2 Q. Do you have a digital marketing person?

3 A. Yes.

4 Q. Who is he?

5 A. Michael Marack.

6 Q. Do you have any other offices in New York or places you'd
7 go that you went for this particular mailing, or was it just
8 104 40th Street?

9 MR. KNOX: Objection.

10 THE COURT: Sustained.

11 Q. Do you know what this is?

12 MR. KNOX: Objection.

13 MR. LEHMAN: Do you have a grounds for the objection?

14 THE COURT: Well, you might want to show it to him.

15 And why don't you mark it. It's a court of law.

16 BY MR. LEHMAN:

17 Q. Do you know what I'm holding?

18 A. Yes. It's a copy of one of my mailings, which, by the way,
19 was mailed to -- post office receipts, USPS, it's called a 3602
20 post office receipt, which documents that it was mailed.

21 Q. Do you know how I got this?

22 THE COURT: Excuse me?

23 THE WITNESS: It may have been handed to you because
24 they're sent samples. It's not sent to you through the mail
25 because there's no address on that, printed on there.

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Shane - Cross

1 MR. KNOX: Your Honor, I'd, again, like to object.
2 Opposing counsel hasn't actually handed the document. We don't
3 know -- it should be described by the witness --

4 THE COURT: This is Defendant Exhibit 1. Is it
5 marked?

6 MR. LEHMAN: Yes, your Honor.

7 THE WITNESS: This looks like a copy of --

8 THE COURT: Mr. Shane, open it up, take your time,
9 and --

10 THE WITNESS: Thank you.

11 THE COURT: Let me advise you now: Only answer
12 exactly what he asks you. Do not go off --

13 THE WITNESS: Thank you.

14 THE COURT: -- rambling.

15 THE WITNESS: This is my first time. Thank you.

16 This is a copy of the mailing that was sent out.

17 BY MR. LEHMAN:

18 Q. Is this the copy of the mailing that was sent out for David
19 Morris International?

20 A. It looks like it. I can't promise you, I send out a lot,
21 but it looks like it.

22 Q. Do you use a company to send those out?

23 A. Yes.

24 Q. Which company do you use to send those out?

25 A. It's a division of R.R. Donnelley Printing.

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Shane - Cross

1 Q. What is the name of that company?

2 A. It's a division of R.R. Donnelley Printing. This would
3 have been Northwest Mailing Services, I believe.

4 Q. Do you know where they're sent out from?

5 A. They are printed, I believe, in Chicago -- this is six --
6 this is several years ago. I believe they're printed in
7 Chicago, and then they are distributed to bulk mail centers
8 around the country.

9 THE COURT: You withdrew your claim for fraud.

10 MR. LEHMAN: I'm not arguing --

11 THE COURT: Just a second. If your argument that you
12 made a moment ago, that he didn't actually mail these, that's a
13 fraud claim, and you have withdrawn that.

14 MR. LEHMAN: Your Honor, it would be a fraud claim if
15 at the time he made the contract, he had the intent not to mail
16 it. However, if he made the contract with the intent to mail
17 it, and then later on decided not to do it or just didn't do it
18 inadvertently, negligently, it would just be a breach of
19 contract.

20 THE COURT: You withdrew that claim, too.

21 MR. LEHMAN: The element that he has to show is
22 performance of the contract. By not mailing it, he would not
23 be showing performance of the contract on his part.

24 THE COURT: Yes, you're right, but you withdrew your
25 counterclaim for breach of contract.

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Shane - Cross

1 MR. LEHMAN: That's right, we are not seeking any
2 damages for breach of contract on our side. What we are saying
3 is that he did not adequately perform the contract.

4 BY MR. LEHMAN:

5 Q. Do you have any offices in Florida?

6 MR. KNOX: Objection; asked and answered.

7 THE COURT: As far as I can tell, it's irrelevant.

8 Q. Do you have any people that work for you in Florida?

9 MR. KNOX: Objection.

10 MR. LEHMAN: What's the grounds?

11 THE COURT: Tell me what the relevance is. Some
12 requirement that he perform this contract in Florida?

13 MR. LEHMAN: Your Honor, I would just ask, just this
14 one time, he answer the question, so that -- because what I
15 believe is going to happen is if I start telling you the
16 relevance of this, he will change his answer depending on what
17 I reveal.

18 THE WITNESS: What was the question, please?

19 THE COURT: Do you have an office in Florida?

20 THE WITNESS: I don't have an office in Florida full
21 time, but sometimes, yes.

22 MR. LEHMAN: Your Honor, do you want me to mark --

23 THE COURT: I wanted you to treat this like you would
24 any trial, in which case, yes, you mark exhibits to create a
25 record and clarity on the transcript.

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Shane - Cross

1 MR. LEHMAN: It's already Exhibit B of the plaintiff's
2 affidavit. That's why I was asking.

3 THE COURT: Unless you're adopting it as your own, you
4 don't have to.

5 MR. KNOX: I'm sorry, may I have a copy?

6 MR. LEHMAN: You didn't bring a copy of the
7 plaintiff's --

8 MR. KNOX: I have my copy, but I don't know exactly
9 what you're showing the witness.

10 MR. LEHMAN: It's Exhibit B of --

11 THE COURT: Just show opposing counsel before -- any
12 exhibit before you show it to the witness.

13 MR. KNOX: I would object. This is not an accurate
14 representation of Exhibit B.

15 MR. LEHMAN: Do you have Exhibit B of your own
16 affidavit?

17 MR. KNOX: I do.

18 MR. LEHMAN: May I see it?

19 May I see Exhibit C?

20 MR. KNOX: Exhibit C is a two-page document.

21 MR. LEHMAN: I'm showing the second page of Exhibit C
22 from plaintiff's affidavit, which was represented to be --

23 MR. KNOX: Your Honor, if I may, I would like to
24 object. I'll give opposing counsel permission to use my copy,
25 but I ask the entire exhibit be presented to the witness at

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Shane - Cross

1 this time.

2 THE COURT: There's no reason not to show him the
3 whole thing.

4 MR. KNOX: And to state again, opposing counsel can
5 use my copy.

6 BY MR. LEHMAN:

7 Q. Do you know what this is?

8 A. Yes.

9 Q. What is it?

10 A. It's a business reply card.

11 Q. Was it the business reply card used for David Morris
12 International's mailing?

13 A. It could be. It looks like it.

14 Q. Did you say in your affidavit --

15 THE COURT: Excuse me one second. Do you have any
16 real originals?

17 MR. KNOX: Of this --

18 THE COURT: You know, old traditional colored hard
19 copy.

20 MR. KNOX: I do, your Honor. I brought these because
21 I wasn't able to scan them and upload them to the ECF, so I
22 thought it would be more prudent to bring exactly what was
23 scanned. So I don't have the actual laminated insert.

24 THE WITNESS: This is a copy of it, your Honor, if
25 that helps.

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Shane - Cross

1 THE COURT: Okay.

2 MR. KNOX: May I see it?

3 THE WITNESS: This is what counsel has brought in the
4 envelope. It's in the envelope. And that does look like an
5 accurate representation.

6 BY MR. LEHMAN:

7 Q. Just to read what he put in his affidavit, "Treasure Chest
8 created a response card bearing the logos of both companies on
9 defendant's insert for inclusion in the spring 2016 mailing
10 campaign. A true copy of the response card utilized in the
11 2016 mailing campaign is annexed hereto as Exhibit C."

12 Is there a city in Florida called South Florida?

13 A. Apparently.

14 Q. Were all the cards sent to that address?

15 A. Yes.

16 Q. Have you been to a city called South Florida?

17 A. I don't know that I have.

18 Q. Do you know what zip code that represents?

19 A. I am assuming South Florida.

20 Q. Who picks up these cards?

21 A. A data processing company that I've contracted.

22 Q. And then they're mailed to you or something else happens
23 with them?

24 A. Data processing data entry.

25 Q. What's the name of that company?

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Shane - Cross

1 A. Direct Services.

2 Q. Would you be surprised if I told you there is no city
3 called South Florida?

4 A. No.

5 Q. Are you surprised that there's no address on that?

6 A. Not at all.

7 Q. Why not?

8 A. Because it has a PO box.

9 Q. So you think that that one PO box would be unique within
10 that area code?

11 A. It's not something I've ever given any thought to. I've
12 never had reason to question this.

13 Q. Do you know what happens with these cards after they're
14 sent to the data processing center?

15 A. Yes.

16 Q. Could you please tell me what happens to it?

17 A. They are input -- data processing company picks them up at
18 the PO box, they are input, and retained for a fee. I forget
19 what's required, but whatever it is, it's retained.

20 Q. Do you have any evidence with you that shows that you sent
21 out weekly digital impressions?

22 MR. KNOX: Objection.

23 THE COURT: You can answer that.

24 THE WITNESS: A digital impression?

25 Q. Do you have any evidence with you that you sent out

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Shane - Cross

1 digital -- or weekly, weekly, digital impressions?

2 A. Not on me.

3 Q. Did David Morris ever tell you that he used a unique phone
4 number and a unique code to track any sales that would come
5 through this mailing?

6 MR. KNOX: Objection; hearsay.

7 Q. Did David Morris ever tell you --

8 THE COURT: It doesn't have to be true.

9 THE WITNESS: Did he ever tell me? Not that I recall.
10 Not that I recall.

11 BY MR. LEHMAN:

12 Q. Sitting here now, do you know if David Morris International
13 used a unique phone number and unique code to track any sales
14 from this mailing?

15 A. I wouldn't give that any thought because it's not an
16 accurate way of tracking, so I don't know that he ever did. I
17 wouldn't -- I don't know.

18 Q. Why do you think it's not an accurate way of tracking?

19 A. It's -- advertising 101 expanded answer: Because when
20 somebody gets something in the mail now, he or she can book via
21 going online, calling their travel agent, if they go online,
22 the phone number on the website -- and call the phone number on
23 the website is frequently given than the one that goes in the
24 mailing, so it's not -- no companies use that as a tracking
25 mechanism anymore. That was done way -- when Google came out.

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Shane - Cross

1 So, that's the purpose of the match-back, which was
2 not done, and that's how you accurately track bookings. It's
3 the industry norm.

4 THE COURT: Would you explain to me what match back
5 is?

6 THE WITNESS: Sure. So, match back is the industry
7 way of tracking bookings. You take the address of the
8 booking -- bookings that come in and match them against the
9 addresses of the media's database from a designated time
10 period, and you take address to address, match back to see what
11 the matches are.

12 That's now done throughout the industry, bookings
13 match-back, which was not done in this case, so there's no way
14 for them to know if they got the bookings or not that they're
15 claiming they didn't get.

16 THE COURT: So the match-back would then pick up --

17 THE WITNESS: Bookings.

18 THE COURT: -- pick up a booking regardless of how the
19 customer made --

20 THE WITNESS: Correct.

21 THE COURT: -- the booking?

22 THE WITNESS: So the customer could have booked
23 through his or her travel agent, they could have gone online
24 and booked, they could have called the company directly and
25 booked. So, the way that you get to the bottom line of it is

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Shane - Cross

1 look at the addresses of who received the media from the time
2 the media hit through typically it's 16 weeks and match back.
3 It's the most accurate way of tracking, but it's somewhat
4 imperfect because the media may get credit for a booking even
5 though the person didn't respond to the literature, they just
6 happened to be on the database. The media won't get credit if
7 someone receives the mailing at their home, and they booked in
8 their office, or someone says to their friend, you'll like this
9 trip, you should book.

10 So, it's imperfect, but companies feel it balances
11 out, and it's the most accurate way of doing it, and until you
12 do that, you don't know if you have bookings.

13 THE COURT: I'm curious. How exactly do you do a
14 match-back, because you have --

15 THE WITNESS: There's good faith involved, your Honor.
16 So, it's done half and half. We give our database to the
17 client, and they -- we give them our full amount of database.
18 They then take it, and they do the match-back. They take the
19 bookings that have come in and match them against the database.
20 It's good faith.

21 THE COURT: So your database is on a computer, or you
22 give it to them on a flash drive or something?

23 THE WITNESS: Right.

24 THE COURT: And they similarly have recorded their
25 bookings in a computer-readable form?

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Shane - Cross

1 THE WITNESS: Uh-huh.

2 THE COURT: And you throw them into a program --

3 THE WITNESS: Exactly right.

4 THE COURT: -- which does the match?

5 THE WITNESS: And some will even do it manually, which
6 is crazy, right? They'll do it by hand or like that. So,
7 address to address, and that's how they track it.

8 THE COURT: Does the company pay you something
9 additional to do a match-back?

10 THE WITNESS: We offer it as a free service. Or, if
11 you wanted us to do it, give us your bookings, and we'll do it.
12 And we sign an NDA saying we won't use the names for anything
13 else.

14 So, we can do it, and I have a vendor that does it, or
15 we identify a third party, if they want to do it, or I give
16 them my database, and they perform it, and whatever they say,
17 the results are added up.

18 THE COURT: I think it's a given that in this case,
19 there was no match-back done, but actually there's no reason
20 that it couldn't have been done if the defendant asked you for
21 it?

22 THE WITNESS: That's exactly right. That's exactly
23 right. And that's part of why I'm here, is to make the claim
24 that we didn't get any bookings, you don't know that when you
25 didn't do the match-back, so...

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Shane - Cross

1 THE COURT: Okay. Thank you.

2 THE WITNESS: Thank you.

3 BY MR. LEHMAN:

4 Q. Did you use MailChimp to send out the email blasts?

5 A. We've used MailChimp and another company called Constant
6 Contact. I don't know, at that time period, which one we used.

7 Q. Do you have any records that you send out a weekly either
8 email blast, or on a weekly basis, did any digital impressions?
9 On a weekly basis?

10 MR. KNOX: Objection; compound.

11 THE COURT: You can try to answer.

12 THE WITNESS: Evidence that we do? We can go back
13 and -- yeah, if it's available.

14 And to the point of the digital impressions and
15 emails, in advertising --

16 BY MR. LEHMAN:

17 Q. Please, I asked the question.

18 A. Okay.

19 THE COURT: The answer is, yes, had you asked for it
20 during discovery, you could have gotten it?

21 THE WITNESS: Correct. Thank you, your Honor.

22 Q. Do you remember the database that you showed me on
23 January 26th?

24 MR. KNOX: Objection; it assumes facts.

25 Q. Did you show me a database on January 26th?

I65KTRET

Shane - Cross

1 A. I showed you a database. I don't know the date.

2 Q. Do you remember that database?

3 THE COURT: In what sense? Could he recite it to you
4 now?

5 BY MR. LEHMAN:

6 Q. Could you recite the columns on that database?

7 A. Can I recite the columns? No, I can't recite the columns.

8 THE COURT: What were you just trying to ask, what
9 information --

10 Q. What information was in that database?

11 A. The name and postal address of our recipients.

12 Q. Was there any information on how much money those people
13 had a household income of?

14 A. No.

15 Q. Was there any information on how many times they had been
16 on a cruise?

17 A. In what I showed you? No.

18 Q. Was there any information on the last time they traveled?

19 THE COURT: You can stipulate that the only
20 information, since it was the same thing I'm shown, is the name
21 and an address.

22 THE WITNESS: Thank you, your Honor.

23 We --

24 THE COURT: Stop.

25 THE WITNESS: I'm sorry.

I65KTRET

Shane - Cross

1 Q. Where did you get that information in the database from?

2 A. I don't understand the question.

3 Q. Where did you get the information in the database from?

4 THE COURT: How did you compile your database?

5 THE WITNESS: Thank you, your Honor.

6 The database is made up of -- we've developed the
7 database, I guess, is the question. People who have responded
8 to previous mailings like this, and on our website, and from
9 some travel databases that we rent.

10 THE COURT: So, the bottom line is that everybody in
11 your database has, at some prior time, expressed some interest
12 in travel?

13 THE WITNESS: That's exactly right, your Honor. Thank
14 you.

15 BY MR. LEHMAN:

16 Q. Do you remember giving leads to David Morris International?

17 A. Yes.

18 Q. Did you ever give a lead with an email to David Morris
19 International?

20 A. Yes.

21 MR. LEHMAN: Your Honor, I don't have any more
22 questions.

23 THE COURT: Mr. Knox, you get a chance, if you want.

24 MR. KNOX: My colleague, Alexander Kadochnikov, will
25 do a redirect.

I65KTRET

Shane - Redirect

1 THE COURT: Okay.

2 MR. KADOCHNIKOV: Good morning, your Honor. Alexander
3 Kadochnikov, of counsel to Knox Law Group, on behalf of the
4 plaintiff. I apologize.

5 THE COURT: Good morning.

6 REDIRECT EXAMINATION

7 BY MR. KADOCHNIKOV:

8 Q. Mr. Shane, would you clarify for the Court what the digital
9 impressions are?

10 A. Definition of a digital impression is any eyeball seeing
11 your message online. So that would include -- in addition to
12 email, social media, website impressions, it's any viewing of a
13 message in a digital format, online.

14 Q. So, does a digital impression include email in its
15 definition?

16 A. Yes.

17 MR. KNOX: No further questions.

18 Your Honor, at this time, I would like to move for a
19 directed --

20 THE COURT: Just one second. I might have a question
21 or two.

22 MR. KNOX: Understood. And I apologize.

23 (Pause)

24 THE COURT: Just so I learn more about your
25 business --

T65KTRET

1 THE WITNESS: Yes, ma'am.

2 THE COURT: -- when a recipient of your mailing
3 returns the reply card, and they have circled one or more of
4 the companies -- let's take another one, but we'll take the
5 Breakers. So somebody expresses an interest in the Breakers,
6 how does the Breakers then learn that somebody has circled the
7 Breakers?

8 THE WITNESS: Each week following the mailing, for
9 about eight to ten weeks approximately, we send an email, an
10 Excel spreadsheet, to each advertiser with the name and contact
11 information of that consumer who requested information on their
12 product.

13 THE COURT: Is this the first time that the Breakers
14 used your service?

15 THE WITNESS: No. They have used --

16 THE COURT: How long have the Breakers been a client
17 of yours?

18 THE WITNESS: They have repeated about a dozen times.

19 THE COURT: Typically, let's say for the Breakers, is
20 that once a year, twice a year?

21 THE WITNESS: We mail now, your Honor, twice a year,
22 each spring and fall. Originally it was once a year, and it's
23 gone to twice a year. They will repeat, based on their needs,
24 sometimes twice a year and sometimes once a year. Again, at
25 least a dozen times.

T65KTRET

1 THE COURT: And Cunard Lines?

2 THE WITNESS: They repeat every year. They've
3 repeated probably 15 times, and they frequently actually take
4 two inserts per season.

5 And if I may expand upon that, they have brought in
6 their sister cruise lines based on the success. They are part
7 of Carnival Corp., and they have brought in their other cruise
8 lines.

9 And they did the match backing. That's why they keep
10 coming back.

11 THE COURT: Just to be clear, did some people who
12 received this mailing return the card expressing an interest in
13 the, I think, two companies that it was advertising?

14 THE WITNESS: Yes, they did.

15 THE COURT: Do you know offhand how many -- that's the
16 6,000?

17 THE WITNESS: Yes, that's exactly right, your Honor.

18 THE COURT: Okay. All right.

19 Thank you.

20 THE WITNESS: Thank you.

21 THE COURT: Mr. Knox?

22 MR. KNOX: Never mind at this time, your Honor.

23 THE COURT: Nothing?

24 MR. KNOX: Yes.

25 MR. LEHMAN: Your Honor, I have one question only to

I65KTRET

Morris - direct

1 ask Mr. Morris, to impeach his credibility.

2 THE COURT: Okay. I thought that's what you were
3 trying to do the whole time, but go ahead.

4 MR. LEHMAN: Mr. Morris. That's Mr. Shane.

5 THE COURT: Oh, you want to call Mr. Morris to impeach
6 Mr. Shane? I got it. I'm sorry, I apologize. Okay.

7 THE WITNESS: Thank you, your Honor.

8 (Witness excused)

9 MR. KNOX: Your Honor, if I may, at this time,
10 plaintiff would like to move for a directed verdict on the
11 breach of contract.

12 THE COURT: I'll reserve.

13 DAVID ROBERT MORRIS,

14 called as a witness by the Defendant,

15 having been duly sworn, testified as follows:

16 THE LAW CLERK: Please state your full name and spell
17 your last name for the record.

18 THE WITNESS: David Robert Morris, M-o-r-r-i-s.

19 DIRECT EXAMINATION

20 BY MR. LEHMAN:

21 Q. Mr. Morris, just one question: Did any of the leads that
22 Mr. Shane gave you have emails with them?

23 A. No.

24 MR. LEHMAN: Unless your Honor has other questions, I
25 don't have any.

I65KTRET

Morris - Cross

1 MR. KNOX: I'll cross, your Honor.

2 THE COURT: You may.

3 CROSS-EXAMINATION

4 BY MR. KNOX:

5 Q. Good morning, Mr. Morris.

6 A. Good morning.

7 Q. You stated earlier -- strike that.

8 Is it true that you have been in the advertising
9 business for 35 years?

10 A. I've been in the cruise industry for 35 years.

11 Q. All right. And your position, as you sit here, is that
12 Treasure Chest didn't actually perform its duties under the
13 contract, correct?

14 A. Yes.

15 Q. And part of that belief is based on the fact that, as you
16 state, A-ROSA Cruise Lines only had one telephone number?

17 A. Yes.

18 Q. That number was a unique telephone number, correct?

19 A. Yes.

20 Q. Did A-ROSA Cruise Lines also have a website in 2016?

21 A. Yes. A North American and a German website.

22 Q. Did you have any involvement in the creation of the
23 website?

24 A. Yes.

25 Q. And did your logo appear on that website?

I65KTRET

Morris - Cross

1 A. Yes.

2 MR. KNOX: I'm showing the witness what has been
3 marked as Plaintiff's Exhibit H.

4 MR. LEHMAN: Could I please have a copy?

5 THE COURT: Please show it to counsel.

6 BY MR. KNOX:

7 Q. Mr. Morris, I ask that you please take a look at it and
8 look up when you're done.

9 A. Okay.

10 Q. Can you tell me what this is?

11 A. This is a -- from our website for people wishing to
12 download further information and a digital brochure for A-ROSA
13 cruises.

14 Q. Okay. Does Plaintiff's Exhibit H adequately represent what
15 that website showed when a consumer went to the website in
16 2016?

17 A. Yes.

18 MR. KNOX: I'd like to move it into evidence, your
19 Honor.

20 MR. LEHMAN: No objection.

21 THE COURT: Received.

22 MR. KNOX: It is Plaintiff's H.

23 (Plaintiff's Exhibit H received in evidence)

24 BY MR. KNOX:

25 Q. Mr. Morris, would you please look at page 2 of Exhibit H.

I65ktret

Morris - Redirect

1 There is a telephone number for consumers to contact for A-ROSA
2 cruises, correct?

3 A. Yes.

4 Q. Would you please tell us the phone number?

5 A. (855)55A-ROSA.

6 MR. KNOX: I'm now showing the witness Plaintiff's
7 Exhibit B, already in evidence.

8 Q. Mr. Morris, please take a look and look up when you're
9 done.

10 A. Okay.

11 Q. That's the insert that was sent -- that David Morris
12 International provided for the emailing campaign, correct?

13 A. Yes.

14 Q. Is there a telephone number on that?

15 A. Yes.

16 Q. Please tell us the telephone number.

17 A. (888)372-9995.

18 Q. Those are two different telephone numbers, correct?

19 A. Yes.

20 MR. KNOX: Nothing further, your Honor.

21 REDIRECT EXAMINATION

22 BY MR. LEHMAN:

23 Q. Mr. Morris, do you think you received any business from the
24 mailing?

25 MR. KNOX: Object, your Honor; calls for speculation.

I65ktret

Morris - Redirect

1 MR. LEHMAN: It's what he thinks, your Honor.

2 THE COURT: It's actually irrelevant because there's
3 nothing in the contract that promises business, but he can
4 answer.

5 BY MR. LEHMAN:

6 Q. Do you think you received any business from --

7 A. No, we did not.

8 Q. Why do you say that?

9 A. Well, first of all, there was -- in all of the transactions
10 with this company, there was a specific offer made unique to
11 that company and others, four other companies, that they
12 couldn't access through any other mechanism other than this
13 toll-free number, and this particular offer idea was a savings
14 of about a thousand dollars off of the normal price that you
15 would find on the website or anywhere else that they would have
16 to access through this specific phone number.

17 MR. LEHMAN: No questions, your Honor.

18 MR. KNOX: Your Honor, at this time, plaintiff would
19 like to renew its motion for a directed verdict.

20 THE COURT: Why shouldn't I grant the motion?

21 MR. LEHMAN: There is no evidence that they did weekly
22 digital impressions in this record. There is none.

23 THE COURT: You didn't -- he has sworn to it. He does
24 not need to support everything he says with a document. That's
25 just not the law. And you chose not to engage in the targeted

I65ktret

Morris - Redirect

1 document requests that I suggested that you engage in. You
2 insisted on a trial. The plaintiff wanted to move for summary
3 judgment. You did not want summary judgment, you wanted this
4 trial. You understood the rules of the game. And it's not
5 defective that he has not brought in all the evidence that
6 might exist to support his sworn statement.

7 MR. LEHMAN: Your Honor, I understand what you're
8 holding. The only thing I want to reserve for the appeal is
9 that we did ask for the documents --

10 THE COURT: You know, your entire motion to preclude
11 totally failed to make reference to any specific document
12 request that you were going to argue form the basis for an
13 earlier disclosure. Also, your arguments, every one of them,
14 were just totally flawed. You are arguing about documents that
15 you had received, things that you knew, and --

16 MR. LEHMAN: Your Honor, we never received those
17 documents. Mr. Morris and I went through all --

18 THE COURT: I'm sorry.

19 MR. LEHMAN: There is no evidence that he received
20 any. That's why I moved under hearsay. Those documents were
21 pure hearsay. There's no evidence that he ever received it.

22 THE COURT: Those rulings stand. The affidavit of the
23 plaintiff was totally sufficient in the first place.

24 MR. LEHMAN: Your Honor, I understand what you're
25 holding. I just wanted to preserve it. We, on three

I65ktret

Morris - Redirect

1 occasions, moved to compel discovery, and at the end --

2 THE COURT: No, our discussions were about the list.
3 Listen, I can understand, based on the conference, that there
4 could be some confusion because, to be perfectly frank, I don't
5 think that Mr. Knox had a total mastery of his client's
6 business, but all of that could have been clarified. And it
7 wasn't that he didn't tell us the source of the list at the
8 conference, he did, but perhaps not with the kind of conviction
9 that made it clear what it was. I think it's now totally
10 clear. And I don't think it matters whether there was
11 information on the list about the wealth of the individuals, it
12 doesn't matter when they last took a trip. If that's what you
13 wanted to purchase, you should have insisted on that. You
14 didn't, apparently. And they did what they promised.

15 There's no guarantee -- you understand that, I know
16 you do, that there's no guarantee that you are going to make
17 money from this. They did the mailings, they have the receipt.
18 Frankly, the original document argument, it's rarely, rarely
19 even made these days.

20 MR. LEHMAN: Your Honor, we were entitled, under Rule
21 26(a), to have that company disclose to us at the very
22 beginning of the litigation. That company --

23 THE COURT: How do they know that you're going to
24 claim that they simply didn't do the mailings? How are they
25 supposed to guess that that's the level of nonperformance that

I65ktret

Morris - Redirect

1 you were going to assert? And the bottom line is, it doesn't
2 matter if they failed to give you something at the initial
3 stages. You had every opportunity to ask for it. I gave you
4 further opportunity. You turned it down and said, we want to
5 go to trial, because you thought, I guess, that somehow it
6 would be better to have less of a record. But you just were
7 wrong.

8 MR. LEHMAN: Well, it wasn't because it was less a
9 record, it was because it was becoming unduly expensive to
10 continually have these meet-and-confers that went nowhere, and
11 they only produced --

12 THE COURT: I gave you time -- in person, I gave you
13 telephone conference time, and you had every access to me to
14 resolve any problems. And at that conference, I made specific
15 recommendations to you about targeted discovery. If you wanted
16 to ask the question, show me the documents that establish that
17 you mailed these, you could have asked for that after that
18 conference, but you asked for a trial. So, so be it.

19 So, tell me why I shouldn't grant his motion.

20 MR. LEHMAN: Your Honor --

21 THE COURT: What part of the contract didn't they
22 perform?

23 MR. LEHMAN: Using a legitimate database.

24 THE COURT: Okay. I think that argument just doesn't
25 cut it when a hotel like the Breakers has used them a dozen

I65ktret

Morris - Redirect

1 times, when Cunard Lines and Princess Cruise Lines are using
2 them. They are for real. That's why I asked those questions.
3 This is not fly by night.

4 MR. LEHMAN: Your Honor, we've asked those questions,
5 also. We have come across no evidence that they are actually
6 using this company.

7 MR. KNOX: Your Honor --

8 THE COURT: Did you take a deposition of the Breakers?
9 Did you take a deposition of Cunard Lines?

10 MR. LEHMAN: Are you asking me that question?

11 THE COURT: Yes.

12 MR. LEHMAN: No, we did not.

13 THE COURT: All right. Then his testimony stands,
14 because you're not rebutting it. No, the plaintiff's motion is
15 granted.

16 We will issue either findings of fact and conclusions
17 of law or a brief decision.

18 MR. KNOX: Thank you, your Honor.

19 MR. LEHMAN: Thank you, your Honor.

20 * * *

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